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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA SECOND APPELLATE DISTRICT DIVISION THREE

JAMES X. WU, as Trustee, etc.,

Plaintiff and Respondent,

v.

MICHAEL SHUI,

Appellant;

LLOYD K. WONG, as Trustee, etc.

Defendant.

B285865

Los Angeles County Super. Ct. No. 16STPB04437

APPEAL from an order of the Superior Court of Los Angeles County, David J. Cowan, Judge. Affirmed. Liu Law and Long Z. Liu for Appellant. Robert G. Petrovich for Plaintiff and Respondent.

INTRODUCTION

Michael Shui appeals from the probate court's order granting James X. Wu's petition confirming the validity of a family trust established by Wu's deceased wife and her prior husband, and confirming the transfer and allocation of assets to two subtrusts. Shui, who is a beneficiary of one of the subtrusts, argues Wu's deceased wife violated the terms of the family trust and breached her fiduciary duties by disproportionately distributing assets among the subtrusts. We affirm.

FACTS AND PROCEDURAL BACKGROUND

1. The Man Family Trust

Guy and Jean Shui Man¹ were married and had no children. They established the Man Family Trust (Family Trust) on November 14, 2001. Guy and Jean were the settlors, trustees, and, during their joint lives, the income and principal beneficiaries of the Family Trust. Guy and Jean named Lloyd K. Wong² as the successor trustee of the Family Trust. The Family Trust provided that, upon the death of the first spouse, the surviving spouse was to divide the remainder of the trust estate into up to four separate trusts: the Surviving Spouse's Trust (Survivor's Trust), the Family Bypass Trust (Bypass Trust), the Marital Appointment Trust, and the Marital QTIP Trust.

Article 3 of the Family Trust specified how each of the separate trusts were to be funded upon the death of the first

¹ Because they share the same last name, we refer to them by their first names.

² Wong has not participated in this appeal.

spouse's interest in the community trust estate and the surviving spouse's separate trust estate." The Bypass Trust was to be funded by "a general pecuniary gift equal to the largest amount that can pass free of federal estate tax" taken from what remains "of the deceased spouse's interest in the community trust estate and the deceased spouse's separate trust estate," after paying the deceased spouse's expenses and taxes and allowing for numerous specified deductions. Finally, 50 percent of "the remainder of the deceased spouse's community property trust estate and separate property trust estate" was to be allocated to each of the Marital Appointment Trust and the Marital QTIP Trust.

Article 4 of the Family Trust identified the surviving spouse as the income and principal beneficiary of the Survivor's Trust, and Article 7 identified the surviving spouse as the income beneficiary, and several immediate and extended family members as the principal beneficiaries, of the Bypass Trust. Shui and Wong are the beneficiaries of the Bypass Trust, and Wong is the trustee of that trust. After the death of the first settlor and allocation of the trust estate among the four separate trusts identified above, Article 3 of the Family Trust gave the surviving spouse the power to amend and revoke the Survivor's Trust, but it expressly precluded anyone from amending or revoking "[a]ll other trusts."

2. Guy's Death and Allocation of the Family Trust's Estate

Guy died on July 21, 2008. After Guy died, Jean married Wu. Jean did not fund any of the subtrusts identified in Article 3 of the Family Trust until 2015.

On April 17, 2015, Jean amended Article 4.9 of the Family Trust to name Wu, along with several other individuals and

organizations, as beneficiaries of the Survivor's Trust. Under the April 17, 2015 amendment, each beneficiary, including Wu, was to receive 10 percent of the remainder of the Survivor's Trust's estate upon Jean's death. On May 7, 2015, Jean amended the Family Trust a second time, increasing each beneficiary's distribution under the Survivor's Trust upon Jean's death to 11.11 percent of the trust's estate.

On May 7, 2015, Jean also executed a "Trust Asset Allocation Agreement" (Allocation Agreement), directing how the remainder of the Family Trust's estate was to be distributed among the separate trusts.³ Although Jean funded the Survivor's and Bypass trusts, she decided "not to fund the Marital Appointment or QTIP" trusts.

Jean attached to the Allocation Agreement a schedule identifying what property was to be distributed to the Survivor's Trust and the Bypass Trust (Disbursement Schedule). The Disbursement Schedule provided the value of each piece of property as of the date of Guy's death (July 21, 2008) and the date of allocation (April 30, 2015). For the Survivor's Trust, Jean allocated the following property: (1) her personal residence in San Gabriel, valued at \$600,000 at the time of Guy's death and \$837,878 at the time of allocation; (2) a "Schwab Account" (Schwab A Account), valued at \$132,836 at the time of Guy's death and \$230,470 at the time of allocation; (3) a second "Schwab Account" (Schwab B Account), valued at \$54,755 at the time of Guy's death and \$84,599 at the time of allocation; (4) a "Credit Union Account," valued at \$35,022 at the time of Guy's

³ The Allocation Agreement states that it was effective as of April 30, 2015.

death and \$35,861 at the time of allocation; and (5) a "Citibank Account," valued at \$3,899 at the time of Guy's death and \$52,317 at the time of allocation. Jean allocated to the Bypass Trust a rental property in Los Osos valued at \$1,025,000 at the time of Guy's death and \$984,016 at the time of allocation.

According to the Disbursement Schedule, the total value of the Survivor's Trust's estate was \$826,512 at the time of Guy's death and \$1,241,395 at the time of allocation. The total value of the Bypass Trust's estate was \$1,025,000 at the time of Guy's death and \$984,016 at the time of allocation.

On December 3, 2015, Jean named Wu as the successor trustee and sole beneficiary of the Survivor's Trust if he survived Jean. Jean also provided that, in the event Wu predeceased her, the remainder of the Survivor's Trust estate would pass to the other beneficiaries identified in the May 7, 2015 amendment to the Family Trust. Jean died on February 10, 2016.

3. Probate Court Proceedings

In September 2016, Wu, in his capacity as "acting successor trustee" of the Survivor's Trust, filed a verified petition (Wu Petition) for an order confirming the validity of the Family Trust and the assets of the Survivor's Trust estate. Wu alleged that Jean intended to distribute the remainder of the Family Trust's estate according to the terms of the Allocation Agreement and the Disbursement Schedule. Although she transferred the San Gabriel property to the Survivor's Trust and the Los Osos property to the Bypass Trust, she never transferred the four bank accounts identified in the Disbursement Schedule to the Survivor's Trust before she passed away. After Jean died, Lloyd Wong, the trustee and a beneficiary of the Bypass Trust, "captured and appropriated" the four bank accounts. Through his

petition, Wu sought an order confirming that the Schwab accounts, the Citibank Account, and the Credit Union Account were "subject to the management and control of [Wu] as the successor trustee of the [Survivor's Trust]."

In February 2017, Wong filed a verified petition (Wong Petition)⁴ requesting confirmation that the Schwab A and Credit Union accounts belonged to the Bypass Trust. Wong argued that Jean, acting as the trustee of the Family Trust, breached her fiduciary duties owed to the beneficiaries of the Bypass Trust when she drafted the Allocation Agreement. Specifically, Wong argued that Jean failed to act impartially toward the beneficiaries of the Survivor's and Bypass trusts because: (1) Jean allocated all the assets that had appreciated in value from the time of Guy's death to the Survivor's Trust, while allocating only a depreciated asset to the Bypass Trust; and (2) the total value of the assets Jean allocated to the Survivor's Trust exceeded the value of the asset allocated to the Bypass Trust.

According to Wong, because the property allocated to the Bypass Trust (the Los Osos property) accounted for 55 percent of the total value of the assets from the Family Trust's estate at the time of Guy's death (\$1,025,000 out of a total value of \$1,851,512), Jean should have ensured that the total value of the assets allocated to the Bypass Trust in April 2015 accounted for 55 percent of the value of the Family Trust's estate at the time of allocation. Thus, Wong sought to modify the Allocation Agreement to require Wu to transfer \$264,131 worth of assets

⁴ Wong had filed an objection and response to the Wu Petition in November 2016, which raised arguments nearly identical to those raised in the Wong Petition.

from the Survivor's Trust to the Bypass Trust, minus \$17,745.92 in reimbursements owed to the Survivor's Trust for certain expenses. Wong suggested that the court transfer the Schwab A and Credit Union accounts to the Bypass Trust to make up for the disparity between the values of the estates of the Survivor's and Bypass trusts at the time of allocation.

In June 2017, the court issued a written ruling granting the Wu Petition and denying the Wong Petition with prejudice.⁵ The court concluded Jean did not breach any fiduciary duties she owed to the beneficiaries of the Bypass Trust when she executed the Allocation Agreement because the allocation of the Family Trust's estate between the Survivor's Trust and the Bypass Trust was "not so disproportionate ... so as to be able to infer that Jean was favoring one beneficiary over another."

In August 2017, the court issued an order confirming that the Family Trust was valid and that the Schwab, Citibank, and Credit Union accounts were "subject to the management and control of [Wu] as the Successor Trustee of the [Survivor's Trust]" The court directed Wong as trustee of the Bypass Trust to deliver and relinquish the four bank accounts to Wu as successor trustee of the Survivor's Trust.

Shui, who did not participate in the probate court proceedings, filed a timely notice of appeal from the court's August 2017 order.⁶

⁵ In April 2017, the parties agreed to allow the court to take the Wu and Wong petitions under submission, without an evidentiary hearing, after the court allowed them to submit additional briefs responding to each petition.

⁶ Shui has standing to challenge the court's order granting the Wu petition and denying the Wong petition because Shui is a beneficiary of

DISCUSSION

Shui argues the probate court erred when it granted the Wu Petition and confirmed the assets of the Survivor's Trust under the terms of the Allocation Agreement. Specifically, Shui contends Jean violated the Family Trust and breached her fiduciary duties as trustee of that trust when she allocated a group of assets to the Survivor's Trust that had a disproportionately higher value at the time of allocation than the property she allocated to the Bypass Trust. Shui also contends Jean violated the terms of the Family Trust in the following ways: (1) she did not immediately fund the Survivor's and Bypass trusts after Guy's death; and (2) she amended the Family Trust to name Wu as its sole beneficiary. Finally, Shui argues Wu unduly influenced Jean into amending the Family Trust and executing the Allocation Agreement. All of Shui's contentions lack merit.

1. Jean's Allocation of the Remainder of the Family Trust's Estate

A trustee must administer a trust according to the terms of the trust's instrument. (Prob. Code, § 16000; see also *Penny v. Wilson* (2004) 123 Cal.App.4th 596, 604 (*Penny*) [When

the Bypass Trust who is aggrieved by the court's order. (See *Estate of Zabriskie* (1979) 96 Cal.App.3d 571, 575 ["The failure of a beneficiary who is aggrieved by the order to participate in the probate proceeding below does not deprive the beneficiary of the right to appeal from the order."], citing Code Civ. Proc., § 902.)

⁷ All undesignated statutory references are to the Probate Code.

administering a trust, "[t]he purpose of the trust is paramount ..."].) In addition, the trustee must act impartially toward all beneficiaries of the trust, "taking into account any differing interests of the beneficiaries." (§ 16003.) Thus, the trust's terms are a critical factor in determining whether a trustee erred in administering the trust. (See *Penny*, at pp. 603–607.)

As we explained above, Article 3 of the Family Trust sets forth the terms governing the allocation of the trust's estate upon Guy's death. Article 3 provides that Jean's interest in the community trust estate and the entirety of her separate trust estate were to be transferred to the Survivor's Trust. The Bypass Trust, on the other hand, was to be funded by a tax-free pecuniary gift taken from what remained of Guy's interest in the community trust estate as well as his separate trust estate, after accounting for various expenses, taxes, and deductions.

In arguing Jean violated the terms of the Family Trust and breached her fiduciary duties owed to the beneficiaries of the Bypass Trust when she executed the Allocation Agreement, Shui does not mention, let alone discuss, Article 3's requirements for allocating the remainder of the Family Trust's estate among the Survivor's and Bypass trusts following Guy's death. Specifically, Shui fails to identify any specific assets that he believes were improperly allocated to the Survivor's Trust. More importantly for purposes of determining whether Jean properly allocated the remainder of the Family Trust's estate under Article 3, Shui fails to cite to any part of the record that identifies the nature of any assets he claims were wrongly allocated to the Survivor's Trust—i.e., whether they are part of Jean's separate trust estate, Jean's interest in the community trust estate, Guy's separate trust estate, or Guy's interest in the community trust estate. Without

identifying any specific assets that Shui believes were wrongly allocated to the Survivor's Trust, as well as the nature of those assets, it is impossible to determine whether Jean violated the Family Trust when she allocated the remainder of the Family Trust's estate between the Survivor's and Bypass trusts. (*Dietz v. Meisenheimer & Herron* (2009) 177 Cal.App.4th 771, 799 ["'When an appellant fails to raise a point, or asserts it but fails to support it with reasoned argument and citations to authority, we treat the point as waived.'"].)

Although Shui cites *Penny* to claim Jean breached her duty to deal impartially with the beneficiaries of the Survivor's and Bypass trusts by making a disproportionate distribution of assets among the two trusts, he fails to discuss the facts, holding, or rationale of that case. Shui has therefore waived any argument relying on *Penny*. (See *Behr v. Redmond* (2011) 193 Cal.App.4th 517, 538 [failure to brief issue constitutes a waiver or abandonment of the issue on appeal].)

In any event, *Penny* does not compel a finding that Jean violated the Family Trust or breached her fiduciary duties when she drafted the Allocation Agreement. In *Penny*, the appellants presented evidence and raised arguments establishing the trustee in that case violated a specific provision of the underlying trust requiring equal distribution of the trust's assets among its beneficiaries when the trustee allocated the most valuable asset to one beneficiary, while allocating to the other beneficiaries far less valuable assets. (*Penny*, *supra*, 123 Cal.App.4th at pp. 604–607.) As discussed above, Shui has failed to present any argument, or point to any evidence in the record, that would establish Jean violated any term of the Family Trust when she executed the Allocation Agreement.

2. Jean's Delay in Allocating the Remainder of the Family Trust's Estate

Shui contends the court erred in confirming the assets of the Survivor's Trust because Jean waited almost seven years after Guy's death to allocate the remainder of that trust's estate to the Survivor's and Bypass trusts. Even if we were to assume Jean's decision to wait almost seven years to allocate the remainder of the Family Trust's estate violated the terms of the trust, Shui fails to explain how he was prejudiced by that delay. As the probate court noted in its statement of decision, none of the principal beneficiaries of the Bypass Trust, including Shui, would have been entitled to receive any income or other payments from the Bypass Trust's estate during Jean's life, since she was the sole income beneficiary of that trust. (See Freeman v. Sullivant (2011) 192 Cal.App.4th 523, 527 ["A judgment is reversible only if any error or irregularity in the underlying proceeding was prejudicial."]; Cal. Const., art. VI, § 13.) Shui does not argue that Jean's delay in allocating the remainder of the Family Trust's estate somehow caused her to divide that remainder in a manner that violates the trust's terms.

3. Jean's Amendment of the Family Trust to Name Wu as the Sole Beneficiary of the Survivor's Trust

Shui also contends Jean violated the Family Trust by amending the terms of that trust to allocate the entire remainder of the trust's estate to Wu if he were to survive Jean. According to Shui, Article 3 prohibited Jean from amending any trust, except for the Survivor's Trust, once she allocated the remainder of the Family Trust's estate to the Survivor's and Bypass trusts. This argument is misguided for a couple of reasons.

First, Jean never named Wu as a beneficiary of the Family Trust, as Shui claims in his opening brief. Instead, she amended Article 4 of the Family Trust—the article which creates, and sets forth the parameters for, the Survivor's Trust—to name Wu as the sole beneficiary of the *Survivor's Trust*. Thus, Jean never altered the Family Trust to allow for Wu to receive the entire remainder of that trust's estate once Jean died.

Second, even if we were to assume Jean was prohibited from amending the Family Trust to name Wu as a beneficiary of the Survivor's Trust, Shui has failed to show how he was prejudiced by the amendment. Shui was never named as a beneficiary of the Survivor's Trust. Accordingly, he never had a claim to any portion of that trust's estate that could have been affected by Jean's decision to name Wu as the trust's sole beneficiary.

4. Wu's Undue Influence

Finally, Shui contends Wu unduly influenced Jean to allocate the remainder of the Family Trust's estate in the manner set forth in the Allocation Agreement. Shui asserts, without citing to the record, that Wu unduly influenced Jean because, among other reasons, he would have been in charge of Jean's daily necessities and medicine "since she was sick, and he was able to easily monitor and control her interactions with others due to her physical weakness." This argument lacks merit because it was never raised below and is not supported by the record.

"As a general rule, appellate courts will not entertain arguments raised for the first time on appeal. [Citation.] This rule is particularly appropriate where, as here, the new argument involves questions of fact not litigated in the trial court proceeding." (Henry v. Alcove Investment, Inc. (1991) 233 Cal.App.3d 94, 100–101 (Henry).) Whether a person has exerted an undue influence causing another person to act, or to refrain from acting, by overcoming that person's free will is a fact-specific inquiry. (See Sparks v. Sparks (1950) 101 Cal.App.2d 129, 135 ["What constitutes undue influence and what constitutes sufficient proof thereof depend upon the facts and circumstances of each particular case."].)

The parties below never raised any argument that Jean's decision to modify the Survivor's Trust to name Wu as the sole beneficiary or to allocate to the Survivor's Trust the four bank accounts identified in the Allocation Agreement was the product of Wu's undue influence. Consequently, there is no evidence in the record to support any claim of undue influence. Indeed, the only evidence included in the record are copies of: (1) the Family Trust; (2) the various amendments Jean made to the Survivor's Trust; (3) the Allocation Agreement; (4) Jean's will and codicils to that will; and (5) Jean's and Guy's death certificates. Importantly, there is no evidence addressing Jean and Wu's relationship, aside from a statement in Jean's death certificate that she was married to Wu at the time she died. Nor is there any evidence addressing Jean's mental or physical condition when she executed the various amendments to the Survivor's Trust. Because a claim of undue influence was never raised before the probate court, Shui cannot raise such a claim on appeal. (Henry, *supra*, 233 Cal.App.3d at pp. 100–101.)

DISPOSITION

The order is affirmed. Wu shall recover his costs on appeal.

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WE CONCUR:	LAVIN, Acting P. J.
DHANIDINA, J.	
MURILLO, J.*	

^{*} Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.